PUBLIC PROSECUTOR v. NG CHENG SOOI.

[A. Cr. J. (Thomson, J.) October 12, 1953]

[Ipoh — Criminal Appeal No. 51 of 1953]

Dangerous Drugs Ordinance, 1952, s. 30(3) — Forfeiture of car — Onus of claimant.

The car which was driven by one Soh Lin Chong was stopped by Customs Officers and was found to contain a large quantity of raw opium hidden in secret compartments. The car was seized and, in the event, Soh Lin Chong together with two others were convicted of being parties to a criminal conspiracy to commit the offence of being in possession of the opium found in the car in contravention of section 120(b) of the Penal Code and section 6 of the Dangerous Drugs Ordinance, 1952. In due course, the claimant claimed to be the owner of the car and in terms of section 30(3) of the Dangerous Drugs Ordinance was given an opportunity to shew cause why it should not be forfeited. The learned President, in his judgment, said: "The claimant has satisfied me as I find I am unable to say that his story is any less unlikely than the contrary", and ordered that the car be delivered to the claimant.

The Public Prosecutor appealed on the grounds (i) that the learned President misdirected himself in law with regard to the quantum of proof that was necessary to support the claimant's claim; and (ii) that the evidence clearly showed that the true owner of the car was not the claimant but the convicted person Chan Lye Kim.

Held: (1) what the claimant had to do to discharge the onus that lay upon him was to show that his story was more likely than the contrary; (2) it was not sufficient for the claimant to show that he was the proprietor or the registered owner of the car. What he had to shew was that he was the owner in the sense in which that word is used in section 30(7) of the Dangerous Drugs Ordinance. The claimant having failed to shew that he was the owner, for the purpose of the Ordinance, his claim ought to have been dismissed. The order in the Sessions Court for the return of the car to the claimant set aside.

CRIMINAL APPEAL.

I. T. Davies (Federal Counsel) for the appellant.

K. C. Chan for the respondent.

Cur. Adv. Vult.

Thomson, J. : — This is an appeal from an order of the President of the Sessions Court at Ipoh relating to a Ford Consul motor car No. SF 6828 to which I shall refer as "the car".

On 25th January, 1953, at Chemor the car which was being driven by one Soh Lin Chong was stopped by Customs Officers and was found to contain a large quantity of raw opium hidden in secret compartments.

The car was seized and, in the event, Soh Lin Chong together with one Chan Kok Chong and one Chan Lye Kim were on 2nd July, 1953, convicted of being parties to a criminal conspiracy to commit the offence of being in possession of the opium found in the car in contravention of section 120(b) of the Penal Code and section 6 of the Dangerous Drugs Ordinance 1952. Each of them was sentenced to 6 months' rigorous imprisonment and to pay a fine of $5,000, or a further 9 months' rigorous imprisonment in default of payment, and at the close of the proceedings the car remained in the custody of the Court where, I hope, it still is.

It was thus clear that on 25th January, 1953, a dangerous drug within the meaning of the Ordinance in respect of which an offence under the Ordinance had been committed was found in the car, that the car had been seized, and that it thus became subject to forfeiture under section 30(2) unless "it is proved, to the satisfaction of the Court, that the offence ..... had been ..... committed without the knowledge, consent or connivance of the owner".

In due course, one Eng Cheng Sooi (when I shall call "the claimant") claimed to be the owner of the car and in terms of section 30(3) was given an opportunity to shew cause why it should not be forfeited. The learned President held that the claimant had succeeded in shewing cause and ordered that the car be delivered to him. Against that decision the Public Prosecutor has now appealed.

The grounds of appeal are :—

(a) That the learned President misdirected himself in law with regard to the quantum of proof that was necessary to support the claimant's claim; and

(b) That the evidence clearly showed that the true owner of the car was not the claimant but the convicted person Chan Lye Kim.

With regard to the first ground of appeal, I would only say that it can only be supported by considering a single sentence in the judgment of the learned President in isolation from the rest of what he said. The onus of proof clearly lay upon the claimant and when the learned President said, "The claimant has satisfied me as I find I am unable to say that his story is any less unlikely than the contrary", he was clearly wrong for what the claimant had to do to discharge the onus that lay upon him was to shew that his story was more likely than the contrary. It is clear, however, that that sentence considered in isolation does not correctly reflect the view of the learned President who says elsewhere "I am of the opinion that the position is that at the most all the claimant need do is to establish a reasonable probability that his claim is correct", and again "I find he has established a *prima facie* case of innocent ownership and the prosecution have been unable to break it down". In the circumstances I am bound to say that the first ground of appeal is without substance.

With regard to the second ground of appeal, the claimant had to establish two things :—

(a) That he was the owner of the car; and

(b) That the offence had been committed without his knowledge, consent or connivance.

With regard to the second of these points I see no reason to quarrel with the conclusion of the learned President that the claimant was "innocent", which I take to be a finding that the offence was committed without his knowledge, consent or connivance. Indeed, I would go further and say that having perused the proceedings both on the hearing of the claim and the criminal trial, I can find no evidence whatsoever that could cast doubt on the correctness of that conclusion.

With regard to the first point, however, it would seem that the learned President has overlooked the consideration that it was not sufficient for the claimant to shew that he was the proprietor or the registered owner of the car. What he had to shew was that he was the owner in the sense in which that word is used in section 30 which is as follows :—

"(7) In this section the owner of a conveyance means the person entitled to the possession of the same immediately before seizure."

The only evidence before the Court was that of the claimant, that of the convicted person Chan Lye Kim and that of the documents of title relating to the car. On that evidence the car was bought by Chan in March, 1952, for $5,490 of which sum $3,000 was borrowed from the Asia Union Life & Accident Assurance Society Ltd., repayable, including interest, in 15 monthly instalments of $225. A hire purchase agreement, which is not in evidence, was entered into between Chan and the Insurance Company and on 26th March, 1952, the car was registered in the name of Chan and insured with the Asia Insurance Company Ltd., in his name and the name of the Company from which he had borrowed the $3,000. Some two months later the car was sold by Chan to the claimant in satisfaction of previous debts amounting to $4,900. It was registered in the name of the claimant on 11th July, 1952, but the transfer of ownership was not intimated to the insurers until some considerable time later for the endorsement on the policy transferring Chan's interest to the claimant is dated 6th June, 1953. Presumably the change of ownership was also at some time intimated to the owners under the hire purchase agreement, because the receipt for the eleventh instalment which was due on 26th February, 1953, and was paid on 25th March, 1953, is made out in the name of the claimant though, in fact, according to the evidence this payment was made by Chan.

In November, 1952, an arrangement was come to between the claimant and Chan under which Chan acquired the use and possession of the car on condition that he paid the monthly instalments due under the hire purchase agreement. In pursuance of this arrangement, which apparently was an oral one and not reduced to writing, he took possession of the car and paid all the instalments on it, at least, until its seizure by the Customs authorities which was on 25th January, 1953, although the claimant says he had no knowledge of it until some six weeks later.

I am not saying for one moment that this story is in every respect true. It is, however, the claimant's own story and so he cannot complain if his case is decided in accordance with it. On it, it is clear that the arrangement of November, 1952, between him and Chan was a valid bailment of the car to Chan which was to subsist for at least so long as Chan paid the hire purchase instalments. It is admitted that these instalments were in fact paid by Chan, at least, down to the time of seizure, and it follows, therefore, that immediately before the seizure it was Chan and not the claimant who was entitled to possession of the car and accordingly it was Chan and not the claimant who was the owner of the car as the word "owner" is used in section 30 of the Dangerous Drugs Ordinance.

The claimant, therefore, having failed to shew that he was the owner, for the purpose of the Ordinance, his claim ought to have been dismissed. This appeal is accordingly allowed and the order in the Sessions Court for the return of the car to the claimant set aside. The claimant will pay the costs of the appeal which I assess at $100.

Appeal allowed.

R. M. VENKATACHALAM CHETTIAR & ORS.
v.
N. K. R. ARUNASALAM CHETTIAR.

[O. C. J. (Thomson, J.) October 6, 1953]

[Ipoh — Civil Suit No. 101 of 1952]

Contract — Refusal by administrator to take necessary steps to complete contract — Specific performance — Limitation — Hardship.

In 1943 the fully authorised agent of the registered proprietor of a piece of land negotiated with the plaintiffs regarding its sale. In due course, an oral agreement was entered into; the agreed purchase-money was paid in full; a transfer in accordance with the provisions of the Land Code was executed; the purchasers were let into occupation; and, after a short delay while the vendor's agent complied with the condition of sale that the land should be sold free from encumbrances, there was delivery to the purchasers of the document of title. The delay was due to the then Government authorities' delay in assessing a tax which, under the law as it then stood, had to be paid before registration could be effected. When the tax was ultimately assessed, the purchasers took immediate steps to pay it and so enable their transfer to be registered. It was incapable of registration by reason of the death in January, 1945, of the registered proprietor. The administrator of the deceased proprietor now having refused to take necessary steps to complete the contract, the plaintiffs came to the Court to ask for an order of specific performance.